

**UNITED STATES OF AMERICA  
NATIONAL LABOR RELATIONS BOARD  
WASHINGTON, DC**

Durham School Services, L.P.,	)	
	)	
Employer,	)	
	)	
and	)	Case No. 15-RC-096096
	)	
International, Brotherhood of Teamsters,	)	
Local 991,	)	
	)	
Petitioner,	)	

**EMPLOYER’S REQUEST FOR RECONSIDERATION OF  
BOARD CERTIFICATION OF UNION IN LIGHT OF NOEL CANNING**

NOW COMES Durham School Services, L.P., the Employer herein, and files its Request for Reconsideration of Board Certification of Union in Light of Noel Canning, as follows:

**STATEMENT OF CASE**

On January 10, 2013, the International Brotherhood of Teamsters Local 991 (Union) filed a petition seeking to represent a unit of full-time and regular part-time school bus drivers and monitors employed by the Employer at its Milton, Pace, and Navarre, Florida facilities. The Regional Director for Region Fifteen approved a Stipulated Election Agreement on January 24, 2013. The election was conducted on February 22, 2013. Out of approximately 208 eligible voters, 112 votes were cast in favor of the Union, 74 votes were cast against the Union, and 4 ballots were challenged.

On March 1, 2013, the Employer filed timely Objections to Election. Thereafter, the Employer submitted certain supporting evidence, including a copy of a flyer distributed by the Union, an affidavit of its Manager of Labor Relations and Employee Relations Cal Schmidt, and

affidavits of three unit employees (April Perez, Heidi Gourley, and Barbara Nelson). The Employer's three objections asserted:

**Objection 1 --** Prior to the election, certain individuals, including, but not limited to, agents of the petitioning labor organization, by and through their conduct, engaged in a deliberate attempt to deceive eligible voters by distributing a flyer shortly before the election that contained pictures of eligible voters and language misrepresenting that the pictured employees, including the Company's Observer at the Navarre Customer Service Center, intended to vote in favor of the Union. The creation and attribution of quotes to employees that do not fairly represent the quoted employees' views – especially in such close proximity to the election – interfered with the absolute right of eligible voters to make a free and untrammelled choice on the issue of unionization, violates the statutory rights of quoted employees to cast a secret ballot, and negated the employee's right not to publicize how they intended to vote in the election.

**Objection 2 --** During the election, the NLRB representative assigned to ensure compliance with the Board's election procedures and integrity of the election process at the Pace Customer Service Center engaged in the following conduct that destroyed confidence in the Board's election processes and impugned the Board's election standards: (1) allowing the Company's observer to assist her in carrying the election booth and ballot box out of the voting area to a parking lot so that one of the Company's former monitors, who was not on the Voter Eligibility List, could vote; (2) failed to seal the ballot box when transporting it outside; (3) left the voting area designated and described in the Board's Election Notice unattended, and did not post any notice informing potential voters as to why the voting area was vacant; (4) failed to follow the Board's challenge procedures with respect to the vote cast by a former monitor whose name was not on the Voter Eligibility List; (5) spent a considerable amount of time on the telephone while the polls were open and eligible voters were casting ballots; and (6) engaged in other conduct inconsistent with the Board's election procedures. This conduct, including the undisputed irregularity in the handling of at least one ballot tends to raise a reasonable doubt as to the fairness and validity of the election.

**Objection 3 --** In light of the decision of the United States Court of Appeals for the District of Columbia Circuit in [*Noel*] *Canning v. National Labor Relations Board, et. al.*, No. 12-1115 (January 25, 2013) that President Obama's recent appointments to the National Labor Relations Board are unconstitutional, it is the employer's position that Region 15 currently lacks authority under 29 U.S.C. § 159 to

investigate or conduct a hearing on the pending petition in this matter because, absent a quorum, the Board has no authority to investigate or conduct hearings which may be delegated to Region 15 under 29 U.S.C. § 153 (b). Employer provides this notice and objection in order to preserve such argument for subsequent review, and its continued participation and cooperation in these proceedings does neither waive the foregoing nor acknowledges this Regional Office's authority to investigate or conduct a hearing on the current petition.

Thereafter, the Regional Director conducted an administrative investigation. On March 25, 2013, without holding a hearing or seeking the Employer's position regarding evidence uncovered in her administrative investigation, the Regional Director issued a Report and Recommendation on Objections ("Report"). In this Report, the Regional Director recommended that all three of the Employer's objections be overruled without any evidentiary proceedings. The Employer subsequently filed timely exceptions to the Regional Director's report. On May 9, 2014, the Board, in a 2 to 1 decision, overruled the Employer's exceptions and certified the Union.

### **ARGUMENT**

On June 26, 2014, the Supreme Court issued its decision in *NLRB v. Noel Canning*, \_\_\_\_\_ S. Ct. \_\_\_\_\_, 2014 WL 2882090 (June 26, 2014),<sup>1</sup> unanimously holding that the recess appointments of Members Richard Griffin and Sharon Block were unconstitutional, as the Senate was not in recess at the time. Here, at the time that the petition was filed and the election was conducted, the Board consisted of Griffin, Block, and Chairman Mark Pearce.

The Employer requests that the Board reconsider its certification of the Union in light of the Supreme Court's decision in *Noel Canning*. It is clear from that decision that the Board lacked a quorum on February 22, 2013, when the underlying representation election was

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<sup>1</sup> Because *Noel Canning* did not issue until more than six weeks after the Board issued its decision, the Employer was not in a position to file this request for reconsideration within the normal time period set forth in the Board's Rules and Regulations.

conducted. The Board, of course, has wide authority under Section 9 of the Act to conduct secret-ballot elections, issue a tally of ballots, and to certify the outcome. But this authority can only be exercised by a Board that is properly constituted and has a valid quorum. Further, although the Board has delegated some of its Section 9 powers to its regional directors, when the Board itself is without authority to act, any delegated authority to its regional directors is terminated during the period of incapacity. *Laurel Baye of Lake Lanier, Inc. v. NLRB*, 564 F.3d 469, 473 (D.C. Cir. 2009) (“an agent's delegated authority terminates when the powers belonging to the entity that bestowed the authority are suspended”). The Board’s subsequent certification of the Union is thus fatally tainted and cannot stand. The only conceivable way in which this fatal failure can be cured is for the current properly-constituted Board to set aside the February 22, 2013 election and direct a new election in which employees can determine whether or not they want the Union to represent them.

## **CONCLUSION**

Because the Board lacked a quorum at either the time of the filing of the representation petition or the holding of the February 22, 2013 election and thus did not have the power to conduct an election or take a tally of ballots, that election is null and void and the Board’s subsequent certification of the Union is inherently invalid. The Employer requests that the Board grant this request for review and direct a new election to be conducted by the Regional Director at an appropriate time.

Respectfully submitted this 16<sup>th</sup> day of July 2014.

/s/ Charles P. Roberts III

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## **CERTIFICATE OF SERVICE**

I certify that this day I served the foregoing REQUEST FOR RECONSIDERATION on the following persons by electronic mail:

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Dated this 16<sup>th</sup> day of July 2014

/s/ Charles P. Roberts III